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IN THE

Supreme Court of the United States

October Term, 1974

NO. 74-1099

VILLAGE OF CAMILLUS and the BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,

Petitioners,

vs.

HENRY DIAMOND, New York State Commissioner of Environmental Conservation,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

ALEXANDER J. HERSHA, ESQ.
Counsel for Petitioners
Marine Midland Bank Building
Camillus, New York 13031
Tel. (315) 672-8158

HERSHA & SCOTT, ESQS.
of Counsel.

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Petitioners, Village of Camillus and the Board of Trustees of the Village of Camillus, pray that a Writ of Certiorari issue to review the Order of the New York Court of Appeals entered on December 20, 1974.

Opinions Below

Before the Court of Appeals, the Petitioners brought a motion for permission to appeal to the Court of Appeals. This motion was submitted for decision on November 4, 1974. The

Respondent duly interposed his affidavit in opposition to the motion for leave to appeal. The Court of Appeals denied Petitioners' motion, by order dated December 20, 1974, entered in the office of the Clerk of the Court of Appeals on the same date, said order reprinted herein as a part of Appendix A (A-1). The Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, unanimously affirmed the decision and judgment in the court below, without opinion, by an Order made and filed in the Office of the Clerk of the Appellate Division, Fourth Department, on September 19, 1974. A copy of the Appellate Division Order has also been reprinted (A-2). The decision of the Supreme Court of the State of New York, County of Onondaga, is an unreported opinion, and is set forth in its entirety (A-3).

Jurisdictional Statement

Petitioners commenced this proceeding pursuant to Article 78 of the Civil Practice Law & Rules of the State of New York, seeking an order prohibiting the Respondent from holding a hearing to modify an "Order By Consent" made by the parties to this proceeding on October 4, 1972. The aforesaid Order holds in abeyance a water pollution abatement order affecting Petitioners' municipal sewage system.

This proceeding was commenced in the Supreme Court of the State of New York, Onondaga County, by notice of petition and petition duly served on November 2, 1973. The Respondent appeared and moved to dismiss the petition, which motion was granted by decision of the Supreme Court, Hon. Stewart F. Hancock, Jr., presiding, and said decision is reprinted herein as a part of Appendix A.

Petitioners then appealed from said order dismissing the petition, to the Appellate Division, Fourth Judicial Department. The Fourth Department unanimously affirmed upon the opinion of Special Term, and said order of affirmance is a final order dismissing the proceedings as a matter of law.

Petitioners then moved the Court of Appeals of the State of New York for permission to appeal to said Court of Appeals. The Court of Appeals of the State of New York denied the motion. The jurisdiction of this Court is invoked under 28 USC §1257(3).

Question Presented

1. Whether the "Order By Consent" reprinted here as part of Appendix A (A-4) is a contract made by the parties constitutionally protected under Article I, Section 10 of the Constitution of the United States.

Constitutional Provision Involved

Article I, Section 10, Clause 1: No state shall * * * pass any law impairing the obligation of contracts, * * *

Statute Involved

New York Environmental Conservation Law §17-0303, General Powers and Duties Applicable to Portions of this Article.

* * *

2. The Department shall have administrative jurisdiction to abate and prevent the pollution of waters of the state in the manner herein provided in accordance with the classification of waters adopted by the Department pursuant to §17-0301. * * *

4. The Commissioner is hereby authorized to:

a. Hold any public hearings, receive pertinent and relevant proof from any party in interest who appears at such hearing, compel the attendance of witnesses, make findings of fact and determinations, and assess such penalties therefor as are hereinafter prescribed, all with respect to the violations of the provisions of this Article listed in subdivision 1 of this Section, or the orders issued by the Commissioner;

b. Make, modify or cancel orders requiring the discontinuance of the discharge of sewage, industrial waste or other wastes into any waters of the State in accordance with the provisions of this article listed in subdivision 1 of this Section, and specifying the conditions and time within which such discontinuance must be accomplished.

Statement of Facts

Petitioners are the owners and operators of a municipal sewage collection system and treatment plant. On June 29, 1966, Respondent's predecessor, Hollis S. Ingraham, M.D., Commissioner of Health of the State of New York, signed a water pollution abatement order directing Petitioners to cease and abate all discharges of sewage into the waters of the State in contravention of stream standards unless Petitioners embarked upon a timetable of construction specified in said order. In April 1968, Commissioner Ingraham, by his regional representative, notified Petitioners that the aforesaid order would be held in abeyance and no enforcement would be sought against Petitioners, since Petitioners and the County of Onondaga had joined in a mutual project to build a comprehensive sewage facility which would completely remedy the pollution problem. It was clear to the parties that the Order By Consent dated 1966 could not be complied with by the Village of Camillus acting alone, and that said order could only be complied with upon implementation of a county-wide comprehensive sewage plan. In view of the foregoing, Respondent Henry Diamond, as successor to Commissioner Ingraham, signed an "Order By Consent" dated October 4, 1972. By the 1972 Order By Consent, Petitioners and Respondent agreed that the 1966 Order of Respondent was impossible of performance until the county-wide comprehensive plan was put into effect. Accordingly, the parties agreed to certain interim steps by the 1972 order to be taken by Petitioners, until the comprehensive plan was fully implemented by the County of Onondaga and the Village of

Camillus. The 1972 Order By Consent further set forth that no change in this order would be made or be effective except as may be specifically set forth by written order of the Commissioner upon written application by the Village.

On July 26, 1973, Respondent issued a notice of hearing to Petitioners for the stated purpose of conducting a hearing to set and establish a definite date on or before which all discharges of sewage under the control of Petitioners and into the waters of the State should be abated. The issuance of this notice of hearing was in clear contravention of the contract made by the parties in the form of the Order By Consent dated October 4, 1972. Because of the illegality of the Respondent's act in noticing a hearing for pollution abatement as aforesaid, the Petitioners sought a writ of prohibition to prevent a holding of this hearing, and said proceeding was brought in the Supreme Court of the County of Onondaga in November 1973. Respondent moved to dismiss the petition at Special Term, and said motion was granted. The Appellate Division, Fourth Judicial Department, affirmed the order and decision of Special Term. Petitioners then moved in the Court of Appeals of the State of New York for permission to appeal to the Court of Appeals, said motion being denied by the Court of Appeals.

The Constitutional Question Presented

Upon oral argument of this motion at Special Term of the Supreme Court of the State of New York, Petitioners argued that the parties had made a binding contract when they executed the Order By Consent dated October 4, 1972. It was further argued that this contract obviously involved State action in that the authority to enter into such a contract flowed from Environmental Conservation Law §17-0303(4)(b). Petitioners continued that to allow Respondent to unilaterally breach his contract and seek modification of same, would amount to an unconstitutional application of §17-0303 as aforesaid.

The Opinion of Special Term

The opinion at Special Term dealt only briefly with Petitioners' constitutional contention. Special Term ruled that evidence relating to an abridgement of contract could be offered at the public hearing sought to be held by the Respondent, and subsequently reviewed under the appropriate provision of the Environmental Protection Law and the Civil Practice Law & Rules of the State of New York. Thus, the petition was dismissed as insufficient as a matter of law.

Reasons for Granting the Writ

Under Environmental Conservation Law §17-0303, it cannot be doubted that the Commissioner has the authority to make and modify orders. However, this is not an unfettered right. Since the act of the Commissioner under the relevant State law is unquestionably State action, the act and conduct of the Commissioner is governed by overriding constitutional considerations.

In the case at bar, by the "Order By Consent" dated October 4, 1972, the Commissioner agreed that Petitioners were responsible for certain interim steps pending a final resolution to the municipal sewage problem. The Commissioner undeniably recognized the fact that the Petitioner Village by itself was not able to commence a course of sewage facility renovation which would completely remedy the pollution problem. Accordingly, one of the primary reasons for executing the Order By Consent of October 1972, was to allow the Petitioner to take practical and reasonable measures to abate pollution while the county-wide comprehensive plan was being drafted and ultimately effectuated.

After the making of the administrative order as aforesaid, the Appellate Division, Fourth Judicial Department, decided a case entitled *Matter of Charles v. Diamond*, 42 App. Div. 2d 232. The Commissioner took the opinion of the Appellate Division as a

mandate to correct the sewage problem of Petitioners with all possible speed and to constitute a judicial mandate that the Commissioner was authorized to jettison the order of 1972 toward the end of making a new order. In July of 1973, the Commissioner served notice of a public hearing toward the objective of making a new order which would render completely nugatory the Order By Consent of 1972.

Petitioners submit that the procedure of the New York State Environmental Conservation Department is totally illegal and in contravention of their constitutional right to be free from impairment of their contracts lawfully made. The contract existing between the parties was duly made under authority of New York State law and the Commissioner is not free to enforce a construction of State law which amounts to an unconstitutional application of those provisions of the Environmental Conservation Law which apply to Petitioners' sewage problem. Yet this is what Respondent has decided to accomplish in this case. Respondent seeks to completely ignore the Order of 1972 after Petitioners have placed full reliance upon the terms of that order. By refusing to accept his contractual responsibility, Respondent has deprived the Petitioners of their constitutional right to be free from impairment of their public contract.

Conclusion

The Petitioners and Respondent have entered into a contract proper in all respects and this has never been disputed by Respondent. Respondent seeks to unilaterally abridge that contract and thereby enjoy the benefit of its bargain and at the same time deprive the Petitioners of the consideration legally owing under the same instrument. To allow Respondent to reverse his order of 1972 is to sanction the unconstitutional application of New York State statutes. Because the conduct of

Respondent is so totally arbitrary and inequitable, Petitioners feel that this petition for certiorari should be granted.

Respectfully submitted,

ALEXANDER J. HERSHA, ESQ.
Counsel for Petitioners
Marine Midland Bank Building
Camillus, New York 13031
Tel. (315) 672-8158

HERSHA & SCOTT, ESQS.
of Counsel.

APPENDIX A-1
Order Denying Leave to Appeal to the State of New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twentieth day of December A. D. 1974.

PRESENT, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

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4 Mo. No. 915

Village of Camillus and the Board of Trustees of the Village of Camillus,

Appellants,

vs.

Henry Diamond, New York State Commissioner of Environmental Conservation,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary reproduction disbursements.

/s/ JAMES M. FLAVIN
Clerk

APPENDIX A-2
Order of Affirmance of the Appellate Division, Fourth Department

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APPELLATE DIVISION
of the
SUPREME COURT
State of New York
FOURTH JUDICIAL DEPARTMENT

PRESENT: MARSH, P.J., CARDAMONE, SIMONS, GOLDMAN, DEL VECCHIO, JJ.

Village of Camillus and the Board of Trustees of the Village of Camillus, Appellants,

vs.

Henry Diamond, New York State Commissioner of Environmental Conservation, Respondent.

The above named Village of Camillus and the Board of Trustees of the Village of Camillus, petitioners in this proceeding, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Onondaga, on the 13th day of December, 1973, and said appeal having been argued by Mr. Roger Scott of counsel for the appellants, and by Mr. Martin H. Schulman of counsel for the respondent, and due deliberation having been had thereon

It is hereby ORDERED That the judgment so appealed from be, and the same hereby is unanimously affirmed without costs upon the Opinion at Special Term, Hancock, J.

Enter.
LESTER A. FANNING

Entered: September 19, 1974

LESTER A. FANNING, *Clerk.*

APPENDIX A-3
Decision of Hon. Stewart F. Hancock, Jr.

STATE OF NEW YORK — SUPREME COURT
COUNTY OF ONONDAGA

VILLAGE OF CAMILLUS AND THE BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,

Petitioners,

against

HENRY DIAMOND, New York State Commissioner of Environmental Conservation,

Respondent.

APPEARANCES:

HERSHA & SCOTT, Esqs.
Attorneys for Petitioners
Marine Midland Bank Bldg.,
Camillus, New York #13031
Roger Scott, Esq. of Counsel

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
The Capitol
Albany, New York #12224
Martin H. Schulman, Assistant
Attorney General of Counsel

HANCOCK, J.:

DECISION

Respondent, the New York State Commissioner of Environmental Conservation, has moved pursuant to CPLR §7804(f) to dismiss the petition which seeks an order prohibiting respondent from holding a duly scheduled public hearing. The stated purpose of the hearing is to receive evidence relevant to the proposed modification of certain prior orders made by the Commissioner relating to pollution abatement in the Village of Camillus and particularly sewage discharge into the waters of Nine Mile Creek.

It is undisputed that the Commissioner has been granted by statute the administrative jurisdiction to abate and prevent the pollution of waters of the State (ECL §17-0303 [2]); and to "[m]ake, *modify* or *cancel* orders requiring the discontinuance of the discharge of sewage, industrial waste or other wastes into any waters of the state * * * * and specifying the conditions and time within which such discontinuance must be accomplished" (ECL §17-1303 [b] [emphasis supplied]); and to hold public hearings and to receive all pertinent and relevant proof with respect to such pollution abatement orders. ECL §17-0303 [4] [a].

Orders made by the Commissioner pursuant to ECL §17-0303, including any modification order that might result from the proposed hearing, are by statute subject to review in a writ of certiorari pursuant to CPLR Art. 78. ECL §17-0909 [2]; see *Matter of Village of Whitehall v. Ingraham*, 31 AD 2d 894.

A writ of prohibition is not a proper remedy where, as here, any order or decision of the Commissioner that may be made in the matter is reviewable in a certiorari proceeding. *Matter of Schuyler v. State University*, 31 AD 2d 273; *Matter of Harris Motors v. Klapp*, 296 N.Y. 242; *Matter of Kent*, 20 Misc 2d 923 (Surrogate's Court, 1959); *Matter of City of New York v. Maltbie*, App. Div. 36 affd. 274 N.Y. 464. As stated by the Appellate Division in *Matter of City of New York v. Maltbie*, supra, at p. 38, prohibition "is not favored by the courts, and is never issued as a matter of right, but only in a sound discretion when there is no other remedy; it is not given for the correction of errors, but only to prevent usurpation of jurisdiction, or the exercise of power in an illegal manner or beyond the jurisdiction conferred; and it will be granted only in extreme necessity when the grievance cannot be redressed by the ordinary proceedings at law, in equity, or by appeal. (*People ex rel. Livingston v. Wyatt*, 186 N.Y. 383, 393. *People ex rel. Childs v. Extraordinary Trial Terms*, 228 id. 463, 468; *People ex rel. Cuvillier v. Haggerty*, 238 id. 621.)"

Furthermore, assuming for the purposes of this motion the truth of the allegations in the petition, it must be held insufficient on its face in that there is no showing of extreme necessity for the order or that petitioners will suffer any irreparable injury if the hearing is not prohibited. *Matter of Brandenburg v. Court of General Sessions*, 189 Misc. 7 affd. 272 AD 1013. See also *Matter of Seventh Day Adventists v. Commission on Human Rights*, 27 NY 2d 898; *Matter of Hodes v. Helman*, 19 AD 2d 603, (1st Dept., 1963) and *Richardson v. Hudson*, 9 AD 2d 861 (4th Dept., 1959). Instead, the petition sets forth facts and arguments dealing with the question of whether the respondent's prior order of October 4, 1972 can or should be modified including whether the Commissioner is bound by it as a "duly executed contract" and thereby precluded from making any modification. Such contentions and the evidence relating thereto may be offered at the hearing, made a part of the record,

and judicially reviewed, if petitioners are so minded, pursuant to ECL §17-0909 (2) and CPLR Art. 78.

The Commissioner, even if in some way limited by the prior order of October 4, 1972, as contended, could not legally have divested himself of the jurisdiction and power specifically granted to him by the legislature to hold the hearing in question and to take such action in the matter as may be legal and proper. *Matter of Rochester Transit Corp. v. Pub. Serv. Comm.*, 271 App. Div. 406, 411 (3rd Dept., 1946), lv. to appeal den., 296 N.Y. 1061 (1947). See *Matter of Campo v. Feinberg*, 279 App. Div. 302 (3rd Dept., 1952), affd. without op. 303 N.Y. 995 (1952) holding that the Public Service Commission could not legally be estopped by its prior acquiescence and inconsistent conduct from exercising its statutory authority to regulate practices and rate classifications of public utilities; and see also *Matter of Richardson Employment Agency v. New York State Division of Human Rights*, 40 AD 2d 585, (4th Dept., 1972).

Since no facts are shown which would warrant the granting of the relief requested, even in the exercise of the Court's discretion, the motion is granted.

Submit order.

STEWART F. HANCOCK, JR.
Justice of the Supreme Court

Dated at Syracuse, New York

December 4, 1973

APPENDIX A-4
Order By Consent

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 12 of the Public Health Law,

VILLAGE OF CAMILLUS AND THE BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,

Respondents.

CASE #1244

A previous Order having been issued by the Commissioner of the Department of Health dated June 29, 1966, and

Said Order having contained certain requirements that were impossible of performance by reason of the fact that the Comprehensive Sewage Plan for Nine Mile Creek Drainage Basis was not put into operation, and for other reasons making performance impossible, and

Interim steps being necessary to effect compliance with the Public Health Law and the rules and regulations promulgated thereunder, and

Respondents and the Department of Environmental Conservation having agreed upon such interim steps until the Comprehensive Plan is effectuated and becomes reality, and

Respondents having waived a public hearing and consented to the issuing and entering of this Order, and respondents having agreed to be bound by the provisions, terms, and conditions contained herein, and

It appearing to the Commissioner of Environmental Conservation that it is in the best interests of the people of the State to modify the Order dated June 29, 1966, and to issue a new Order,

NOW, it is hereby:

ORDERED:

1. THAT any provisions of the Order dated June 29, 1966 which are inconsistent with the following are hereby declared null and void.

2. THAT Respondents, immediately upon service of a conformed copy of this Order, cease and abate and thereafter keep abated all discharges by them, or through facilities under control of Respondents, of sewage or industrial wastes or other wastes or of any effluent thereof into the waters of the State in contravention of standards duly adopted and assigned for, and to the receiving of affected waters, or be bound as hereinafter provided:

A. On or before October 15, 1972 complete removal and legal disposal of all sludge, grit and other sediment from the Imhoff tank of the Camillus Village sewage treatment plant.

B. On or before September 15, 1972, after consultation with the Regional Office of the New York State Department of Environmental Conservation, initiate and thereafter continue a program including analyses of influent to and effluent from said plant for settleable solids and monthly analyses for suspended solids and biochemical oxygen demand, said program to be approved by the Department of Environmental Conservation.

C. On or before September 15, 1972 cause repair and/or replacement of the baffles of said Imhoff tank to be completed.

D. On or before October 1, 1972 engage an engineering consultant or consultants for a study of and recommendations for elimination of excessive groundwater and stormwater infiltration into the Village of Camillus sewage collection system.

E. On or before June 1, 1973 submit to said Regional Office an approvable engineering report of a program and plans for elimination of excessive stormwater and groundwater from such collection system.

F. Within 60 days after approval by the Department of Environmental Conservation the respondents will initiate and thereafter diligently pursue to completion implementation of such infiltration elimination program, within the legal and financial limitations imposed by law.

G. On or before October 1, 1973 submit to said Regional Office a summary of the repairs and improvements made to said collection system to prevent excessive infiltration, and respondent will report annually thereafter.

3. THAT as consideration for the issuing and entering of the Order herein by consent and as consideration for the Department's forebearance from initiating a penalty action for violations the Respondent shall within fifteen (15) days of the service of a conformed copy of this Order post or deposit with the Department a financial undertaking in cash, check, or other negotiable instrument, in acceptable form, or a surety bond issued by a company licensed to do business in the State of New York, in a form acceptable to the Department, in the amount of (TEN THOUSAND DOLLARS ($10,000.00)---) payable to the Commissioner of Environmental Conservation upon condition that upon ten (10) days written notice to the Respondent said financial undertaking shall be forfeited and paid to the Commissioner if at any time the Respondent fails to comply with any or all of the provisions of this Order, provided however, that the Respondent has not requested in writing and been granted a

prior formal modification of said provisions by the Commissioner of the Department; and provided further, that the forfeiture or payment of said amount shall in no way prejudice the right of the Commissioner to institute such other and further action as he may deem necessary in order to insure full compliance with this Order, the Public Health Law and the Environmental Conservation Law of the State of New York.

Provided further, however, that said financial undertaking shall be returned to the Respondent upon written request to the Department with proof acceptable to the Department to establish that the Respondent has complied fully with the provisions of this Order.

4. THAT no change in this Order shall be made or be effective except as may be specifically set forth by written order of the Commissioner upon written application by the Respondent for the relief sought.

5. THAT the provisions, terms and conditions of this Order shall be deemed to bind the Respondent, and its agents, servants, employees, successors and assigns and all persons, firms and corporations acting under, or for it, including but not limited to those who may carry on any or all of the operations now being conducted by Respondent, whether at the present location or at any other location in the State of New York or who shall have any interest, financial or otherwise, in the conduct of such operations.

DATED: October 4, 1972

/s/ HENRY L. DIAMOND
HENRY L. DIAMOND, Commissioner
New York State Department of
Environmental Conservation

TO: Alexander L. Heresa, Esq.
Attorney for Respondents
Second Floor
Marine Midland Bank Bldg
Camillus, N. Y. 13031

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of the foregoing Order without further notice and waives its right to a hearing herein and agrees to be bound by the provisions, terms and conditions contained therein.

Village of Camillus
BY /s/ MORRIS A. RAICHLIN
TITLE Mayor
DATE September 12, 1972

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